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No. 84-1877

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STEARNS COMPANY, ET AL. - - Petitioners

*versus*

DONALD P. HODEL, Secretary of the Interior, Et Al. - - - - - - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## REPLY BRIEF FOR THE PETITIONERS

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RAMEX MINING CORPORATION - - - *Petitioners*

*v.*

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## REPLY BRIEF

The respondents' brief in opposition to the petition for writ of certiorari presents to this Court a simplistic and erroneous description of the issues. Moreover, the respondents fail to explain away the enormity of the consequences of the lower courts' rulings. The issues in this case are subtle, yet they are crucial to maintaining the proper relationship between the Government and its people. This Court must not be swept away by the respondents' mirage of a simple, logical and constitutional statutory scheme for the regulation of private minerals when such a scheme is not remotely contemplated by Section 522(e)(2) and would not be constitutional if it were. Review of this case is truly necessary to determine the extent to which a zealous federal agency can expand the scope of a congressional act to restrict the exercise of private property rights.

The respondents contend that Section 522(e)(2) constitutes a regulation of private minerals (when the United States owns the surface estate) because an operator would have to come "on Federal lands" to extract the minerals. Resp. brief at 10. They also maintain that the section recognizes and honors the sanctity of private mineral estates by providing that, if a mineral owner can establish that he has "valid existing rights" under a deed, then he can mine

without being subject to the restrictions of Section 522(e)(2). Consequently, the Office of Surface Mining Reclamation and Enforcement (OSM) is saying to the petitioners: "Look, if you can show us that you really have a deed which gives you the right to reasonably use the surface estate to deep mine your coal, we've got no problem because the section says you can mine under the valid existing rights exception." THIS IS NOT THE ANSWER, though, for each premise of the respondents' position is wrong.

Does Section 522(e) really purport to regulate private mineral estates? The petitioners say "no"! The section's entire thrust is to regulate the mining of federal coal; no mention is ever made of private mineral interests.[1] The respondents say "yes"; *i.e.*, even though the mineral owner has the right under state law to use so much of the physical surface as is necessary to extract the coal, Section 522 is a regulation of that right. Resp. brief at 10 n.6. Although the petitioners believe that their interpretation of Section 522 is clearly correct, at worst the language is ambiguous which permits the Court to investigate the legislative history of the section. In their brief, the respondents did *nothing* to explain away the inescapable conclusion presented in such history. As set forth in the original petition,

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[1]For example, a statute establishing the procedure argued by the respondents to be established by Section 522 would (1) identify the property to be regulated; (2) set up the administrative procedures for such regulation; (3) establish guidelines to be used by the agency in determining "valid existing rights"; and (4) provide remedies for private parties who fail to obtain a favorable "valid existing rights" determination. Instead of these provisions, though, Section 522 declares only that its provisions are "subject to valid existing rights." This language hardly calls for the regulatory scheme argued by OSM. Indeed, this language is fully consistent with the legislative history declaring that property rights are to be determined by state courts.

the Senate Committee Report states that Section 522(e) does not attempt to regulate the mining of private minerals, but provides for a "departure" from such non-regulation "where the Federal government owns the coal." S. Rep. No. 128, 95th Cong., 1st Sess. 56 (1977). Mr. Udall added that Section 522 "does not attempt to deal with" the situation which exists when the minerals are owned by private parties. Cong. Rec. H § 3757 (1977). And Representative Lujan warned "it would be contrary to the intention of the Act and a misuse of the Act, for the Forest Service (or anyone else) to argue that the Surface Mining Control and Reclamation Act somehow modifies the relationship between the owner of the surface and the subsurface rights."[2] H. R. Rep. No. 218, 95th Cong., 1st Sess., *reprinted in* 1977 U. S. Code Cong. and Ad. News 593, 718. This history establishes without question that Section 522 was intended to regulate only federally-owned coal, not privately held minerals.

The respondents suggest that the petitioners should not be too upset about the applicability of Section 522 because they might be protected by that section's "valid existing rights" provision. Resp. brief at 13 n.8. However, this reliance is misplaced for two reasons. First, the declaration in the respondents' brief that deed rights determined under state law are to be controlling is *completely* at odds with the history of the two regulations attempted to be promulgated by OSM! The first regulation was the "all

[2]Of course, the greatest modification of the relationship between a mineral estate owner and a surface estate owner would be an act placing in the surface estate owner the right to control the exercise of the mineral rights. If Section 522 applies as the respondents suggests, the long-standing property law principle that, to have any real value, a mineral estate must have "dominance" over the surface estate would be turned on its head.

permits" test, which said that if you did not have all your permits on or before August 3, 1977, you could not mine your coal. 30 C.F.R. § 761.5 (1979). This proposal certainly would not have protected private mineral owners (such as the petitioners) who were *not* actively mining or preparing to mine imminently. Significantly, a proposal or consideration which *would* recognize deed rights as "valid existing rights" was specifically rejected by the agency.

After the "all permits" test was withdrawn, OSM attempted to promulgate a "taking" regulation, *i.e.*, one which said that OSM could apply Section 522 as stringently as possible to limit the exercise of private mineral rights provided that, if such regulation is later adjudged to constitute a "taking" under the Due Process Clauses of the United States Constitution, then the mineral owner shall be deemed to have had "valid existing rights" all along. 30 C.F.R. § 761.5 (1983). Although this regulation has now also been withdrawn, the regulatory history of "valid existing rights" mandates the conclusion that OSM is determined to eliminate or to restrict to the maximum extent possible the rights of the private mineral owner granted under state law — and the respondents' position to the contrary in this case should receive little or no credence.

The second problem with the respondents' position on "valid existing rights" is that it suggests that somehow OSM is ordained by Section 522 to be the determining authority as to the existence of the petitioners' valid existing property rights rather than the courts. This inference cannot be sustained, however, for four reasons: (1) As noted, the section does not purport to establish the regulatory scheme contemplated by the respondents; (2) The legislative history *cited by the respondents* makes it clear that property rights established under state law are not to

be tampered with;[3] (3) Two provisions in the Surface Mining Act specifically prohibit OSM from determining property rights (*See* 30 U.S.C. §§ 1257(b)(9) and 1260(b)(6)(c)) yet the respondents' entire argument is that the petitioners' legal right to mine under their deed should be determined as "valid" and "existing" by OSM before they are allowed to mine; and (4) Judicial determinations (such as those required in the construction of a deed) should be performed by the courts rather than an administrative agency created by the legislature. Thus, if the United States in this case believes that the petitioners somehow do not have the right to deep mine under their deed (an unusual position indeed since Stearns has exercised its right to deep mine on many occasions since 1937), the government can go to court to get an adjudication of that issue just like every other surface owner.[4]

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[3]At page 9 n.5 of their brief, the respondents declare: "Congress recognized that state law governs disputes involving the respective property rights of the owners of the mineral and surface estates." This concession, though, effectively concedes the validity of the petitioners' argument. The dispute in this case is whether the petitioners, because of the United States' ownership interest in the surface, have to seek and obtain permission from OSM prior to deep mining. Yet under Kentucky law, a mineral owner reserving the right to mine does not have to ask permission from the surface owner prior to mining, nor does such a mineral owner have to prove *to the surface owner* that he has a valid existing right to mine. If state law governs disputes such as this (which is precisely the position of the petitioners), the question is what role does Section 522 play? The answer: none!

[4]The respondents suggest in their Brief at 13 n.8, that state law might not give to these petitioners all the rights which they have suggested to the Court are attendant in their deed. Such is not so, however. The cases cited by the respondents involved the question of whether the deed conveyed the right to strip mine, not

*(Continued on next page.)*

The respondents say that, if the petitioners are not required to obtain a valid existing rights determination prior to mining, the national forests would be left "unprotected" and "unregulated." Resp. brief at 11 n.7, 14. But how can this be so when (1) the United States has the deed to the land — so the respondents know what rights were bargained for and conveyed; and (2) all mineral operators (including the petitioners) have to comply with every substantive mining provision of the Surface Mining Act, including the permitting provisions under which the operators must present to OSM the deed under which they claim the authority to mine. 30 U.S.C. § 1257(b)(9). Indeed, the general provisions of the Act are specifically designed to "protect" *all* land from the perils involved with unregulated surface mining. Consequently, the United States does not need the "valid existing rights" provision of Section 522 to protect its surface estate.

If OSM is correct that Section 522 regulates private mineral interests, then the petitioners maintain that, in enacting the section, Congress exceeded its constitutional authority. As with the statutory construction issue, though, the respondents leave the petitioners' argument virtually unaddressed.

Section 522, if construed as OSM suggests, applies to private mineral estate owners only when the United States owns the accompanying surface estate. Thus, the sole condition which triggers operation of the regulation is federal ownership. Moreover, if so construed, the application of Section 522 would serve, in the layman's sense, to "protect"

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*(Continued from preceding page.)*
deep mine. Those cases were properly decided in the courts, though, contrary to the position taken here by the respondents that the petitioners must have their property rights determined by OSM.

the federally owned surface.[5] The issue, then, is whether the regulation of private mineral interests solely to protect and enhance a proprietary interest of the United States is a lawful exercise of power under the United States Constitution.

The respondents apparently concede that Section 522 cannot be defended as a valid exercise of the Property Clause. *See* Resp. brief at 15 n.12. Rather, they contend that the constitutional arguments of the petitioners have been answered by the *Hodel* decisions[6] upholding the general provisions of the Surface Mining Act as a valid exercise of the commerce power. The petitioners do not contest the holding in *Hodel,* yet neither the *Hodel* decisions nor the bases therefor can serve to support the constitutionality of Section 522(e)(2).

In the *Hodel* decisions, this Court held that Congress, acting under the Commerce Clause, can validly regulate the manner and method of extracting minerals. The Court relied upon the congressional finding that the national interests justified the regulation of coal mining because of the well-documented risk to the utility of the land for "commercial, industrial, residential, recreational, agricultural, and forestry purposes, . . ." 452 U. S. at 277 *quoting* 30

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[5]The respondents did not even attempt to answer the petitioners' argument that Section 522 cannot serve to "protect" the United States' surface estate when, by operation of law, that estate is subservient to and subject to the dominant mineral estate. If one property interest is subject to another, the exercise of the latter cannot be said to injure or harm the former. Consequently, under property law principles, when a mineral owner exercises his right to mine, he is *not* disturbing the surface estate, as erroneously declared by the respondents. Resp. brief at 5.

[6]*Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U. S. 264 (1981); *Hodel* v. *Indiana,* 452 U. S. 314 (1981).

U.S.C. § 1201(c) (1976 ed., Supp. III). This finding was made to justify the general provisions of the Surface Mining Act, which provisions apply fully to operations to be conducted by all private mineral owners. *Id.* at 276. But when Congress was espousing the reasons for the enactment of the general provisions of the Surface Mining Act, it certainly was not espousing the reasons for Section 522. This conclusion is supported by at least three facts:

(1) Section 522, if construed as the respondents contend, applies only in very defined and limited situations based upon federal ownership of the surface estate, while the congressional pronouncements were directed to very general aspects of surface mining based upon the economic and environmental impact of such mining (i.e., regardless of ownership);

(2) The restrictions imposed under Section 522 are far greater than those set forth in the other provisions of the Act. If these higher standards were required to protect "forestry," then the Act would have utilized them rather than the less stringent standards adopted;

(3) Within the boundaries of national forests, many millions of acres, comprising both surface and mineral estates, are owned by private individuals—and many of these acres are presently being mined. These activities are *not* being subjected to the rigors of Section 522, though, because the United States has not acquired the surface estate. Thus, no environmental concern would be remedied by the respondents' interpretation of Section 522; rather, the only effect would be the enhancement of the property rights of the United States under the guise of the Commerce Clause. This effect, though, is unconstitutional because it is based solely upon a classification adopted by Section 522 which is invalid under the Due Process Clause of the fifth amend-

ment. This amendment requires that a Congressional classification must be reasonable and not violate equal protection under the fourteenth amendment. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589, 55 S. Ct. 854, 863, 79 L. Ed. 1593 (1935); *United States* v. *Cress,* 243 U. S. 316, 326, 37 S. Ct. 380, 384, 61 L. Ed. 746 (1917). The arbitrary circumstance of federal ownership of the suface estate does not constitute such a reasonable and rational classification. Thus, if Section 522(e)(2) of the Act were an exercise of power under the Commerce Clause, it would deny due process because it would not fall equally on all within any legitimate class of coal producers.

It is thus patently evident that Section 522 was not enacted to effect some broad regulatory scheme under the Commerce Clause, but it was precisely such a scheme, *not Section 522,* which was upheld as constitutional in *Hodel.*[1] In *Hodel,* the argument being advanced was that Section 522 effected a "taking" of private mineral rights requiring just compensation under the fifth and fourteenth amendments. The issues of whether the section applied to such rights in the first instance, and, if it did, whether it was a constitutional exercise of the commerce power, were never raised. However, the court refused to make a "taking" determination, citing its "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Id.* at 294-95. The wisdom of this principle is evidenced by this case—where the facts force a determination of the two questions necessary to be answered *before* a tak-

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[1] *See* 452 U. S. at 294. Of course, the petitioners recognize that Section 522 did create a regulatory scheme for the mining of federally owned coal — certainly a legitimate exercise of power under the Property Clause.

ing issue becomes "ripe" for decisions: (1) Does the statute apply by its terms to the conduct sought to be regulated?; and (2) Did Congress have the constitutional authority to regulate the activity described in the statute? Only when these two questions are answered in the affirmative is the taking question appropriate—and the court in *Hodel* never attempted to answer either of them. Thus, while there is no doubt that *Hodel* upheld many general provisions of the Surface Mining Act, such a holding cannot be extended to provisions in the Act which were specifically excepted by the Court.

## CONCLUSION

Section 522 does not apply to the petitioners by its terms, and, even if it did, there is no constitutional authority for such application. Accordingly, this Court should grant certiorari not only to interpret the specific provisions of Section 522(e)(2), but also to determine the extent of Congressional authority under the Commerce Clause to regulate private property based solely on a related proprietary interest of the United States.

Respectfully submitted,

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